IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1926.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, *Appellant*, vs. MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY as Trustees, Etc., et al., *Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF APPELLEES FOR REHEARING.

GEORGE-BANNER PRINTING COMPANY, CHICAGO.

IN THE

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CHICAGO AUDITORIUM ASSOCIATION, *Appellant,* *vs.* MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY as Trustees, Etc., et al., *Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION OF APPELLEES FOR REHEARING.

To the Honorable Justices of the United States Circuit Court of Appeals for the Seventh Circuit:

And now come:

Mark Skinner Willing and The Northern Trust Company as Trustees under the Last Will and Testament of Henry J. Willing, deceased; and Mark S. Willing, by Samuel Topliff and Homer H. Cooper, their solicitors;

William A. Slater, Charles L. Harrison and E. Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, deceased; Bayard Warren, Jr., and Bayard Tuckerman, Jr., as Trus-

tees; and William A. Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren and Phyllis Sears Tuckerman, by Mitchell D. Follansbee, Watson Washburn and John E. Gavin, their solicitors;

Illinois Merchants Trust Company as Trustee under a Trust Deed from The Corporation of The Fine Arts Building, dated March 5, 1903, etc.; Illinois Merchants Trust Company as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1889, etc.; Illinois Merchants Trust Company as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1892, etc., by Frank M. McCulloch, its solicitor;

Louis M. Greeley, Guardian *ad Litem* of Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.; and

Roswell B. Mason, Guardian *ad Litem* of Infant Defendants John Fox Slater, Elena De Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman, by Henry G. Miller, his solicitor:

and pray the court for a rehearing in above entitled cause for each and all of the reasons herein following set forth.

I.

THE DECISION OF THE COURT IS ERRONEOUS.

Much of the court's holding is summed up in this sentence on Page 8 of its opinion:

> "And, too, though there be no negative provision appearing in the lease, a clause susceptible of such construction, though it be a forced one, may, if accompanied by a hostile assertion by an adverse claimant, be the basis of a cloud on title."

Here is a new doctrine—new law. The holding surpasses both the *Rector* v. *Rector* and *Hood Rubber Com-*

pany decisions. In those, which are the only cases remotely like the case at bar, the courts struck down explicit covenants. In the former, where statutory jurisdiction existed, the isolated holding is not in accord with other decisions of New York. In the latter, the hearing was *ex parte*. Here we have no explicit covenant to be stricken. At most we have numerous clauses susceptible of varying constructions, which the appellant desires the court to construe, not to strike down. And the "assertion" of our "adverse claim" is not hostile, as courts define legal hostility; nor did our denial of appellant's claims ever appear except in answer to the prior voluntary challenge of appellant. Can it now be that this court holds a tenant can *create* a removable cloud by orally questioning *his own* title?

However the answer may appeal to conceptions of What-ought-to-be-the-law, all you have and all you ever can make of the issue is a difference of opinion as to the rights of parties under a contract. The very first step in so-called adjudication is to construe the leases. When you have done that, with due regard for all the facts, you are through—completely through. All else is subsidiary. The case is ended. You find, if you try to draft a decree for the appellant, that you have simply declared the rights of the parties. Nothing concrete, nothing that *any* court heretofore ever defined as a cloud, has been removed.

Nevertheless, the court says that where the construction of the only instrument under which a plaintiff holds title is doubtful, though the doubt be a forced one, and a defendant takes a vocal position in opposition to the plaintiff's ideas, a bill to settle the argument is a bill to remove a cloud from the plaintiff's title. That holding, we submit, is not supported by any decision of a

federal court and is contrary to the unbroken law of the state where the property lies.

In *Guffey* v. *Smith*, 237 U. S. 101; in *Holland* v. *Challen*, 110 U. S. 15; in *Clarke* v. *Smith*, 38 U. S. 195, and in many other cases, the Supreme Court has said local law controls federal courts in dealing with local property rights. And in *Parker* v. *Shannon*, 114 Ill. 192; 121 Ill. 452; in *Rigdon* v. *Shirk*, 127 Ill. 411; in *McCarty* v. *McCarty*, 275 Ill. 573, and in *Greenough* v. *Greenough*, 284 Ill. 416, the highest Illinois court has held that in Illinois an oral assertion of title by an adverse claimant, accompanied by great violence (*Parker* v. *Shannon*), and based upon *admitted*, not forced, doubtful construction of the plaintiff's instrument, is *not* a removable cloud.

Seemingly this court disposes of the above precedents and their plain rules under its classification of "the strict" holdings (page 8 of opinion) and deliberately follows the flicker of a pronounced minority of "liberal holdings" in states other than the state where our real estate is situated. Is not this a strange practice for a federal court which, if its jurisdiction is doubtful, ordinarily declines to act? And is it not stranger still for a federal court to ignore the teachings of the Supreme Court which dictate that local law governs definition of title to local property?

The opinion says the court is at a loss to understand why jurisdiction is uniformly denied where the alleged cloud grows out of the very instrument constituting the basis of the plaintiff's title, as here. The court quotes (opinion, p. 6) from *First Congregational Church* v. *Page*, 257 Ill. 472—"It would be a rather anomolous situation to permit one to remove as a cloud upon his title a part of the granting clause of the only instrument un-

der which he claims"—and observes: "We are not satisfied that the existence of a common instrument creating appellant's title and appellees' cloud calls for a refusal of a court of equity to act." With all deference, we submit that here this court errs most.

When the court must find the basis of the plaintiff's claim and the basis of the defendants' denial of that claim both within the confines of the plaintiff's muniment of title, the court must first of all determine the plaintiff's own right before it can proceed to consideration of the defendants' alleged wrong. That is to say, the court must first construe the instrument. But a bill to remove a cloud is relief against a defendant who impairs a right the plaintiff *clearly has*. It is not, and must not be, in any degree, an adjudication of the existence or validity of the plaintiff's *own* right. The suit *presupposes* the clear validity and complete existence of the plaintiff's title, and is directed exclusively against the alleged invalid adverse claim of the defendant. All the evidence, all the rules of law, everything involved in the lawsuit, are confined absolutely to an inquiry as to the existence and invalidity of the defendant's claim. So, whenever, as here, the initial inquiry is compelled to be an inquiry as to the existence and validity of the plaintiff's own primary right, then is the court asked to adjudicate the plaintiff's title and not to remove any cloud. That this is the law, and that the court has no such power or jurisdiction in a suit brought to remove clouds, are expressly stated by the Supreme Court in the case of *Phelps* v. *Harris*, 101 U. S. 370, an excerpt of the opinion being set forth on page 40 of our brief.

In this case, if jurisdiction be exercised as prayed, the ultimate decision as to whether the plaintiff has or has not the rights it claims will be simultaneously a de-

cision that the defendants have or have not the rights the defendants claim. One movement—the construction of the leases—virtually determines every issue. The claims are *conflicting;* the court, deciding, ends the conflict. But that is not removing clouds from a clear title of the plaintiff; that in this instance is simply the process of *adjudicating* the *plaintiff's* title for or against the *plaintiff* upon claims made by the *plaintiff*.

In (1927) *Subirana* v. *Kraemer*, 17 Fed. (2nd) 725, the Court of Appeals for the First Circuit reiterated the doctrine for which we have been and here are again contending—the doctrine of *Orton* v. *Smith*, *Holland* v. *Challen*, *Phelps* v. *Harris*—that federal courts must not permit suits disguised as bills to remove clouds from title to become in practical effect suits to adjudicate title. In the *Subirana* case, the court had occasion to say (italics ours):

> "It is well established in the federal courts that 'those only who have a *clear, legal and equitable* title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or to dissipate a cloud on the title.'"
>
> * * * * *
>
> "Furthermore, it is not the jurisdiction of equity to adjudicate upon the *conflicting titles* of parties to real estate—that is for the law court; and one who brings a bill in equity to remove a cloud upon his title must not only set out facts that *he has a clear legal* title, but also set out the pretended title, that it is clearly invalid and such as may, at the present or a future time, embarrass him in controverting it."

Wherefore, courts, especially federal courts, of chancery lack power to act under the pretension of removing clouds from title where the alleged title and the alleged cloud arise from the same clauses in the same granting instrument. The operation of such power necessarily

consists of construing a contract *inter vivos*. The exercise of such jurisdiction would be the adjudication of *conflicting* claims or titles. Equity has not that jurisdiction. Here lies the compelling reason for the doctrine of *First Congregational Church* v. *Page, Phelps* v. *Harris, Devine* v. *Los Angeles,* and other precedents which, we thought, were binding on this court. (See p. 44 of our brief, also.)

There is surely justification for our belief that the court itself regards this as an exceptional case calling for novel application of a remedy never heretofore stretched so broad. In departure from precedent, in the exclusion of Illinois law and in virtual disregard of Supreme Court decisions, this court has opened the doors of chancery to all landlords and tenants who are unable to agree upon the interpretation of long term leases. Just how wide the doors are opened depends upon how exceptional the case, it seems; but whenever large interests are involved in any sincere dispute, so that it may be said one party cannot enjoy the fullest use of his alleged, but dubious, rights because the other party orally differs, then may one hale the other before the chancellor, and then may the chancellor construe their leases and lay down rules of conduct for their future guidance. Of a certainty, this is precisely what the Supreme Court, in (1927) *Liberty Warehouse Co.* v. *Grannis,* ..... U. S. .....; 71 L. Ed. 303; 47 Sup. Ct. Reporter, 282, said federal courts were not able to do where the facts were different but where the question is substantially similar.

Thus, if the opinion stands, is the procedure of declaratory judgments and decrees made available in those cases where property rights are involved under the construction of deeds, leases, party-wall agreements and

other contracts. Possibly the avenue so laid open may be convenient, economical, expedient; but it is not, or, at least, we respectfully urge, was not, the law.

However strongly the ultimate picture may intrigue, the individual conceptions of judges, uninfluenced by seductive plausibleness, should yield to the law. In petitioning this court to reconsider its main holding and to alter its decision to an affirmance, the language of Mr. Justice McReynolds in (1927) *United States* v. *Stone & Downer Co.*, ... U. S. .....; 71 L. Ed. 728 on 738, furnishes our concluding remonstrance:

> "Nearly one hundred years ago, Mr. Justice Story announced the fundamental doctrine which no court should forget: 'Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare "*ita lex scripta est*", to follow, and to obey. Nor, if the principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience.'"

II.

IN ANY EVENT, THE OPINION SHOULD BE MODIFIED TO AVOID PREJUDICIAL INFLUENCE ON TRIAL UPON THE MERITS.

After painstaking examination of the court's opinion, counsel for appellees conclude that the decision is meant to go thus far and no farther: that the district court has jurisdiction to determine the issues raised by the *allegations* of the bill of complaint. In other words, we believe, and in our belief are supported by numerous references of the court to the pleadings rather than to the evidence, that this court has rendered its decision as though the case were here on bill of complaint and a motion to dismiss (demurrer).

Nevertheless, en route to its conclusion, the court, in

its opinion, has had occasion to make statements which are susceptible of interpretation or application prejudicial to the substantive rights of appellees in further proceedings. The caveat to the trial judge is persuasive that such statements are written to reflect only contentions of appellant, but, in view of the broad scope further litigation must take, it would be unfortunate if statements such as the following should erroneously be accepted as the law of this case:

Opinion, p. 7:

> "In the absence of any provision in the lease itself, it is likewise hardly conceivable that a lease for 198 years, or even one for 99 years, should be so construed as to deny to the lessee the right to rebuild as changing conditions require."

Opinion, p. 7:

> "And it then follows, as an unavoidable deduction from the grant for a lease for 198 years, that the building or buildings which were to be constructed thereon should, from time to time, be repaired, and at some time during the existence of the lease be replaced by new buildings."

Opinion, p. 14:

> "Appellant's right to maintain the suit is predicated upon its implied right to rebuild, which arises from the grant of a 198 year lease."

The tenor of these statements seemingly is that the grant for 198 years, by virtue and force of the duration of the term, itself, carries an implied grant of the right to tear down the existing building and to replace it with another building. If that be the law, then, indeed, is little left for the court below to do in the matter of construing the leases. We do not believe this court intended now to construe any line or clause of the leases; and yet, on pages 9, 10 and 11 of the opinion, this court sets out important provisions thereof and says: "Inasmuch as these clauses do not specifically deny appel-

lant's right to rebuild, it is argued * * *." Our realization that that observation (with which we do not and cannot agree) is hitched to consideration of jurisdiction only, is accompanied by our equal realization that every portion of this opinion will be urged hereafter in this case, and in others for which this unusual decision would become a precedent, as authority for the maximum plea.

Whether such implied grant arises from the very duration of the term demised, and whether the above or any clauses in the lease sanction or forbid replacement of any existing structure at any time, are questions of substantive law going to the merits. We are loath to believe that the decision of this court is purposed to determine any such question at all. If it were, surely some of the points set forth in our outline (Appellees' Brief, pp. 3-4) as rules of construction would have received attention and mention.

If the court has equity jurisdiction, the construction and the interpretation of the leases is probably the most important feature of a trial upon the merits. Obviously, if this court has construed the leases in any material matter, its construction omits investigation of the law of waste, judicial interpretation of the numerous covenants in the light of such cases as *Bass* v. *Metropolitan W. S. E. Co.*, 92 Fed. 857, and most of the evidence. Nothing the court says at this stage should prevent us from going to the greatest rightful effect cases such as *The Northern Trust Co.* v. *Thompson*, decided June 14, 1927, in the Appellate Court of Illinois, First District, not yet reported. There the Appellate Court was called upon to construe a 99-year lease of property at Madison and Dearborn Streets, in Chicago, made in 1869. The tenant covered the existing 6-story buildings, 25 years

old, had become "practically worthless" and "wholly inadequate", etc., as here, and offered to erect a modern large building of far greater value, contending that under the lease, "properly interpreted", he had that right. The lessor was a trustee and prayed a state court of chancery for instructions as to whether it should consent to the program. The relevant clauses of the lease and the holding of the court are contained in the following excerpt from the opinion bearing Mr. Justice Gridley's name for the bench:

> "Although there is no express provision in the lease granting to the lessees the right to remove the building upon the premises or to rebuild it, there is a covenant therein on their part that 'in case of loss or damage by fire *or otherwise* to the buildings, now upon said premises *or that may hereafter be erected thereon*,' they will 'rebuild or repair the same within twelve (12) months thereafter, equal in value or condition to the building or buildings so destroyed or damaged.' And counsel for the trustee further contended before the chancellor, and further contend here, that, because of the language of the covenant, and particularly the words italicized, the right in Thompson (assignee by mesne assignments from the original lessees) to remove the present building and erect another in its stead, and the power in the Trustee to execute with Thompson the compromise agreement, may properly be implied. We cannot agree. It seems clear to us that said clause, as regards rebuilding or repairing the building, has reference only to the contingency where the building is destroyed or damaged by fire or other *casualty*, and affords no basis for the claimed implied power on the part of the Trustee. And we fail to see wherein the holdings in the case of *Hawes* v. *Favor*, 161 Ill. 440, cited by counsel, are at variance with these views."

We are prepared to concede that this court had no occasion to travel in these fields of substantive law in order to decide here the one question actually decided;

but we earnestly submit that this court should not leave even so much as an inference of its judicial views in those fields as to the substantive rights of either party under the leases.

Mortgagees.

This court has apparently overlooked the fact that there has been no conference or discussion, verbal or written, between the lessee and the bondholders or mortgage trustee, casting any "cloud" or reflection upon the title to the equity of redemption, so as to authorize any court to meddle with the contract relations of the parties with respect to the mortgages. No one claims that he has talked about that, or that there is any "cloud" upon that title. No one has pointed out anything to give the court jurisdiction over the relations or status of the parties as mortgagor and mortgagee.

One issue of bonds matures February 1, 1929 (Trans., 203); another, March 1, 1933 (Trans., 205); the third, February 1, 1942 (Trans., 203),—total $1,935,000. Even if it be "implied" that the building will not last 198 years, it is not to be presumed that a mortgage lien upon a leasehold estate will go out of style February 1, 1942. Where the parties have not seen fit to contract for substitution, it is not within the functions of the court to offer to the mortgagee, instead of his lien, something else "just as good." The court may think that a Ford car is out of date and that a mortgage upon an airplane is preferable to one on a Ford, but no other court has gone so far as to force its preference upon the mortgagee of an old-fashioned car.

The court says:

"But it is in the security, nothing more, that it is

interested" (p. 13) * * * "the mortgagee" [meaning mortgagor] "offers cash or bond security in twice the amount of the mortgage during the period of construction, or until such time as the court fixes." (p. 14) * * * "Wherein is it prejudiced?" (p. 13).

In assuming such power to act for parties, presumably competent to make their own contracts, the court is apparently blinded to the fact that it is the mortgagees' judgment that should control the terms upon which they will lend their money.

The judges of this court may think that a personal bond or deposit "until such time as the court fixes" is just as good. The lenders trust and back their own business judgment. The judges give no security for the outcome of their judgment upon this financial question of the goodness of a substitute for what the parties have contracted that the bondholders shall have. They are entitled to have the security specified in the contract,—not some substitute of the court's selection. Encroachments upon the inviolability of contracts are no more welcome because made by the court with the statement that the mortgagee is interested "in the security, nothing more"—when that statement implies security of the court's selection instead of the security that the parties contracted that the mortgagee should have.

Another instance should be mentioned. Speaking of the bondholders' rights, the court says, in effect, that the bondholders are bound by the principle of notice—that if the leases permit rebuilding, the bondholders must have known it when they invested their funds. This conclusion is quite true so far as it goes. But an additional consideration must not be overlooked. There are covenants in the trust deeds about preserving the

security, about waste, etc., bearing upon the rights of the lessee as mortgagor. (See answer of Illinois Merchants Trust Company as Trustee, Trans. 148, XII.)

Above all, we trust the court does not think us quibbling over phraseology. We are not unmindful of the fourth paragraph on page 13 of the opinion. Neither are we unconscious of publicly printed interviews in which the president of appellant company was quoted as predicting the resultant probability of early construction of a fifty-story hotel. Finally we do not overlook that in the first sentence of that paragraph, this court says it has refrained from stating appellees' "fact position regarding this clause in the lease". (We are not able to understand just which clause the court means, and we suspect an inadvertence). Our contentions, aside from equity jurisdiction and still to be decided in this suit, are more than simply "fact" positions; they include questions of law, such as waste, the legal construction of the leases in the light of all the evidence and authorities, the power of any court to do that which appellant prays, and so on. Every one of these issues, whether of fact *or of law*, should, we urge, be left utterly open. Some of them, we think, may be unintentionally affected by the present opinion.

Perhaps it may be helpful—and the court graciously has said our efforts heretofore have been helpful—to suggest that the opinion, if this petition for rehearing do not completely avail, be modified so that *all* those portions fraught with danger of prejudice to determination of all substantive questions be expressly defined as simply the allegations of appellant.

We again request the court to reconsider the decision it has rendered.

With this petition, certain of the appellees file also a motion to vacate the order of affirmance and to remand the case to the state court.

Respectfully submitted,

SAMUEL TOPLIFF,

HOMER H. COOPER,

Counsel for Mark S. Willing and The Northern Trust Company as Trustees under the Last Will and Testament of Henry J. Willing, Deceased; and Mark S. Willing.

MITCHELL D. FOLLANSBEE,

WATSON WASHBURN,

JOHN E. GAVIN,

Counsel for William A. Slater, Charles L. Harrison and E. Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, Deceased; Bayard Warren, Jr. and Bayard Tuckerman, Jr., as Trustees; and William A. Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren and Phyllis Sears Tuckerman.

FRANK H. McCULLOCH,

Counsel for Illinois Merchants Trust Company, as Trustee under a Trust Deed from The Corporation of The Fine Arts Building, dated March 5, 1903; etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1889, etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated February 1, 1892, etc.

LOUIS M. GREELEY,

Guardian ad litem of Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

ROSWELL B. MASON,

Guardian ad litem of Infant Defendants John Fox Slater, Elena De Struve, Adrian Malone, Bayard Warren, Jr., Lily Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman.

HENRY G. MILLER,

Of Counsel for Roswell B. Mason as Guardian ad litem.

And on the same day, to wit: On the twenty-fifth day of June, 1927, there was filed in the office of the clerk of this court "The Motion of Certain Parties to Vacate All Orders Heretofore Entered, etc." which said Motion is in the words and figures following, to wit:

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, a corporation *vs.* MARK SKINNER WILLING and THE NORTHERN TRUST COMPANY as Trustees, etc., et al.	Pending in this court on appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE MOTION OF CERTAIN PARTIES TO VACATE ALL ORDERS HEREIN HERETOFORE ENTERED AND TO REMAND THIS CAUSE TO THE CIRCUIT COURT OF COOK COUNTY, STATE OF ILLINOIS.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Solicitors for Mark Skinner Willing and The Northern Trust Co. as Trustees, etc., and Mark S. Willing.
LOUIS M. GREELEY,
Guardian ad Litem for Certain Infant Defendants.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 3733

CHICAGO AUDITORIUM ASSOCIATION, a corporation *vs.* **MARK SKINNER WILLING** and **THE NORTHERN TRUST COMPANY** as Trustees, etc., et al.	Pending in this court on appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE MOTION OF CERTAIN PARTIES TO VACATE ALL ORDERS HEREIN HERETOFORE ENTERED AND TO REMAND THIS CAUSE TO THE CIRCUIT COURT OF COOK COUNTY, STATE OF ILLINOIS.

To the Honorable Justices of the United States Circuit Court of Appeals for the Seventh Circuit:

Now come Mark Skinner Willing and The Northern Trust Company as trustees under the last will and testament of Henry J. Willing, deceased, and Mark S. Willing, by Samuel Topliff and Homer H. Cooper, their solicitors; and also Louis M. Greeley, guardian *ad litem* of infant defendants Margaret Willing, Evelyn Pierrepont

Willing and Mark Skinner Willing, Jr., and move the court to vacate all orders herein entered, especially the order of affirmance, and to remand the above entitled cause to the Circuit Court of Cook County, State of Illinois, for each and all of the following grounds:

1. The bill of complaint, at the time the same was filed in said Circuit Court of Cook County, State of Illinois, and at the time of the filing in said state court of the petition of certain defendants to remove the case from said state court to the federal court, did not state or present a controversy which is wholly between citizens of different states and which can be fully determined as between them;

2. The cause of action, if any, as set forth in said bill of complaint at said several times is single and indivisible;

3. The subject matter of the controversy as set forth in the bill of complaint at said several times is single and entire;

4. The bill of complaint at said several times set forth no separable controversy between the plaintiff and the defendants joining in said petition for removal which can be fully determined between them without the presence of other defendants in the case, or some of them;

5. There are parties defendant indispensable to the determination of the above cause who are citizens of the State of Illinois and who were citizens of the State of Illinois when said bill was filed and when said petition for removal was filed, while Illinois was and is the state of residence and citizenship of the plaintiff corporation;

6. The record discloses no grounds of federal jurisdiction;

7. The record discloses no grounds for the removal of said cause from said state court to a federal court;

8. Even though it be said that the suit relates to distinct titles, there are, nevertheless, three or more separate, distinct, independent suits in that view; and the removal of one such suit does not carry with it to a federal court the other such suits.

With this motion, the petitioners annex a memorandum of points and authorities in support thereof and respectfully request the court to consider the same.

MARK SKINNER WILLIAMS and
THE NORTHERN TRUST COMPANY,
As Trustees under the Last Will and Testament of Henry J. Willing, Deceased; and
MARK S. WILLIAMS,
By SAMUEL TOPLEY,
HOMER H. CROSBY,
LEWIS M. GOODLEY,
As Guardians ad Litem for Infant Defendants Margaret Willing, Evelyn Pierrepont Willing and Mark Skinner Willing, Jr.

MEMORANDUM OF POINTS AND AUTHORITIES ON MOTION TO REMAND.

MAY IT PLEASE THE COURT:

The foregoing motion is a repetition of very similar motions made by the same parties in the District Court on December 24, 1924, and on February 2, 1925 (Trans., 292-3) and overruled by Judge Wilbur on (Trans., 296-7) without opinion.

In justice to ourselves, we assure the court we have not omitted to stress the point at any proper time since our study of the case revealed to us its existence. The point appears in our answer to the bill of complaint. (Trans., 303-4.) The decision of the District Court on the issue of equity jurisdiction favored these moving parties, and that situation prevented us from assigning error over to the decree from which this appeal was taken. (1902) *Gunewardene Co. v. Phoenix Co.*, 124 Fed. 170 on 172; (1925) *National F. I. Co. v. Elliott*, 7 Fed. (2nd) 522 on 525. We did, however, invite, in the only manner apparent to us, the attention of this court to the presence of our point in appellee's brief. (Footnote on page 20.)

Furthermore, under sufferance the admission that so long as the courts hold that they had no jurisdiction of the case, these parties, as a practical matter, needed to have little concern as to the grounds for that decision. our position always has been, and is, that no court has any jurisdiction on any theory; that the issue is one for business dealing, not for judicial determination. Since, however, at the time of the filing of this motion, this court has considered that equity jurisdiction exists, we believe it our duty to urge, and to urge in the only

method now known to us, that federal court jurisdiction does not exist under the Removal Act.

THE STATUTE.

The provision of the Judicial Code under which the original defendants (hereafter called the Sears-Slater defendants, being the owners of the "Peck few") filed their petition for removal of the case from the Circuit Court of Cook County to the United States District Court is as follows (Title 28, Chap. 3, Sec. 71; formerly Sec. 28 of Jud. Code, as amended, Act Jan. 20, 1914, c. 11):

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

Our point may be summarized: There is not in this suit a controversy *wholly* between citizens of different states which can be *fully determined* as between *them*.

WHAT IS THE CONTROVERSY?

The first inquiry concerns the nature of the controversy in this lawsuit. As to that, the law is—

> THE EXISTENCE OR NONEXISTENCE OF A SEPARABLE CONTROVERSY IS TO BE DETERMINED WHOLLY BY THE CASE STATED IN THE ORIGINAL BILL OF COMPLAINT AS IT STOOD WHEN THE PETITION FOR REMOVAL WAS FILED.
>
> (1909) *Gregory* v. *Cochin*, 132 U. S. 571; 33 L. Ed. 462.
>
> (1885) *Louisville, etc. Co.* v. *Ide*, 114 U. S. 52; 29 L. Ed. 63.

(1894) *Wilson* v. *Oswego Township*, 151 U. S. 56; 38 L. Ed. 70.

(1906) *Alabama, etc. Co.* v. *Thompson*, 200 U. S. 206; 50 L. Ed. 441.

In the last of these citations, selected from many more, the court says:

> "It has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack, and the case which he makes in his declaration, bill or complaint, that being the only pleading in the case, is to determine the separate character of the controversy for the purpose of deciding the right of removal. * * * In other words, the right to remove depended upon the case made in the complaint * * *."

So firmly is this rule entrenched that the courts hold subsequent amendments (*Bernheim* v. *Louisville Property Co.*, 221 Fed. 273), or differing and inconsistent defenses by the defendants, or even defaults by defendants (*Louisville, etc. Co.* v. *Ide*, 114 U. S. 522; 29 L. Ed. 63; *Fidelity Ins. Co.* v. *Huntington*, 117 U. S. 280; 29 L. Ed. 898; *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528; *Hax* v. *Caspar*, 31 Fed. 499) are not to be considered. Neither is it material that the interests of the defendants as between themselves are separate and distinct. (*Bellaire* v. *Baltimore, etc. R. Co.*, 146 U. S. 117; 36 L. Ed. 910; *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528; *Wilson* v. *Oswego Township*, 151 U. S. 56; 36 L. Ed. 70; *Bryan* v. *Barriger*, 251 Fed. 328.)

We shall endeavor to conform to the above rule, though if the rule permitted incorporation of the whole record now before this court our contentions would be strengthened in every particular.

What, then, is the issue or controversy as raised by the allegations of the original bill of complaint?

The opinion heretofore rendered by this court evinces our belief that the case stated by the plaintiff has been so impressed upon the memory of the court that the passage of a few weeks has not erased it, and that we need only recapitulate the salient features. The original bill of complaint commences with the making of five separate leases. (Trans., 6-15.) Then, the plaintiff "proceeded at once, by and with the knowledge, consent and procuration of all of the lessors in said several leases" (Trans., 17) "to erect thereon *one entire building.* None of those parts of said building which are located upon the respective tracts of ground demised by the Walker leases, or by the Studebaker leases, or by the Peck lease, are separable from the entire building taken as a whole, but at the time of the execution of the five original leases aforesaid, all of which were substantially identical in their conditions and general provisions, it was contemplated and intended by all the parties to said leases that a single building, not separable into parts apportionable to the separate leaseholds, should be erected on said Auditorium property, and the present building was constructed in accordance with such intention, and cannot be dismembered without heavy expense and loss."

These conditions have continued. The building is described by the plaintiff as "indivisible." (Trans., 18.) The Walker fee comprises about 84 per cent of the total ground area; the Peck fee comprises about 10 per cent, and the Studebaker fee comprises the remaining 16 per cent. The building covers the entire five tracts. Just here we digress briefly to point out that cross-easements of support exist between the fee owners, for the building belongs to the fee owners. (*Springer* v. *Darlington*, 207 Ill. 238; *Gibson* v. *Holden*, 115 Ill. 199; *Ingals* v.

Plamondon, 75 Ill. 118; *Foote* v. *Yarlott*, 238 Ill. 54; *Bass* v. *Metropolitan, etc. R. Co.*, 82 Fed. 857.)

The first mortgage of February 1, 1889, conveyed the leaseholds on all five tracts. (Trans., 15.) So did the second mortgage of February 1, 1892. (Trans., 16.) No apportionment of security and no provision for partial releases as to separate leaseholds appear.

The dilemma of the lessee, predicated upon its allegations of instability of building construction, of financial loss in operation, of impending foreclosure by bondholders and the like, is spread over the entire building. The conclusion is clear that whatever relief can be granted must embrace the whole property. Judicial sanction for removal and replacement of the one "indivisible" building, covering five tracts under five leases and furnishing security under two mortgages, is sought by the plaintiff.

The prayers for relief (Trans., 27-32) necessarily seek establishment of plaintiff's alleged rights as against all the lessors and as against the trustee of the bond issues.

THE PARTIES.

The plaintiff at all times is a citizen of Illinois. (Trans., 3.)

The Sears-Slater defendants, being lessors of the Peck fee, at all times are citizens of states other than Illinois—Massachusetts and New York. (Trans., 112-118.)

The Walker-Willing defendants include Ambrose Cramer, as trustee, and he at all times was a citizen of Illinois. His successor, The Northern Trust Company, is a citizen of Illinois. Mark S. Willing is a citizen of Illinois.

The lessors of the Studebaker fee (the Chapins), defendants, apparently were at all relevant times citizens of Illinois.

The Illinois Trust & Savings Bank as trustee under the bond issues (now Illinois Merchants Trust Company) was at all relevant times a citizen of Illinois.

All of these defendants are indispensable parties. *Without any one of them, the plaintiff's case as stated in its pleading would fail.* Something has been said in the opinion rendered by this court about ability to finance a new enterprise; obviously no money could be borrowed without a decree binding every one of the above defendants.

THE CONTROLLING QUESTION.

Wherefore, in determining whether there is a separable controversy between the plaintiff and the Sears-Slater defendants, the court is called upon to answer this inquiry:

> Can the plaintiff have the relief it seeks without including relief as against all the defendants?

If the answer is "No"—which it surely is—then there is not "a controversy which is wholly between citizens of different states and which can be fully determined as between them," as the removal statute demands.

The answer is "No" because the plaintiff cannot obtain the relief it prays—the right to tear down and replace the indivisible building in its entirety as against lessors, easement holders and mortgage trustee—if any one of the above named defendants succeeds in defeating the plaintiff's claim. The plaintiff must prevail against *all*, else it fails.

THE LAW.

Out of the very many decisions of courts upon the issue here presented, we have selected the following. Some are cited because they are leading cases. Others present more nearly similar facts.

I.

THERE IS NO SEPARABLE CONTROVERSY UNDER THE REMOVAL ACT UNLESS THERE IS A SEPARATE AND DISTINCT CAUSE OF ACTION AS TO THE DEFENDANTS SEEKING REMOVAL WHICH CAN BE DECIDED AS BETWEEN SAID DEFENDANTS AND THE PLAINTIFF IN THE ABSENCE OF ALL THE OTHER DEFENDANTS.

(1892) *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528.

(1886) *East Tenn. etc. R. Co.* v. *Grayson*, 119 U. S. 240; 30 L. Ed. 382.

(1882) *Frazer* v. *Jennison*, 106 U. S. 191; 27 L. Ed. 131.

(1885) *Pirie* v. *Tvedt*, 115 U. S. 41; 29 L. Ed. 331.

(1885) *Crump* v. *Thurber*, 115 U. S. 56; 29 L. Ed. 328.

(1886) *Plymouth Mining Co.* v. *Amador Canal Co.*, 118 U. S. 264; 30 L. Ed. 232.

(1886) *Little* v. *Giles*, 118 U. S. 596; 30 L. Ed. 269.

(1883) *Winchester* v. *Loud*, 108 U. S. 130; 27 L. Ed. 677.

(1884) *Ayres* v. *Wiswall*, 112 U. S. 187; 28 L. Ed. 693.

(1894) *Wilson* v. *Oswego Township,* 151 U. S. 56; 38 L. Ed. 70.

(1911) *Railroad Co.* v. *Willard,* 220 U. S. 413; 55 L. Ed. 521.

(1890) *Graves* v. *Corbin,* 132 U. S. 571; 33 L. Ed. 462.

Subsidiary to the main point, the following are helpful:

WHERE THE PLAINTIFF IN ITS PLEADING STATES A JOINT CAUSE OF ACTION AND SEEKS JOINT RELIEF AGAINST ALL OF THE DEFENDANTS, IT IS NOT WITHIN THE POWER OF THE DEFENDANTS OR OF THE COURT TO SPLIT UP THE PLAINTIFF'S CASE INTO SEPARATE AND SEPARABLE CONTROVERSIES.

(1906) *Alabama, etc. R. Co.* v. *Thompson,* 200 U. S. 206; 50 L. Ed. 441.

(1885) *Louisville, etc. R. Co.* v. *Ide,* 114 U. S. 52; 29 L. Ed. 63.

(1890) *Graves* v. *Corbin,* 132 U. S. 571; 33 L. Ed. 462.

(1890) *Louisville, etc. R. Co.* v. *Wangelin,* 132 U. S. 599; 33 L. Ed. 474.

(1911) *Chicago, etc. R. Co.* v. *Willard,* 220 U. S. 413; 55 L. Ed. 521.

WHERE THE PLAINTIFF'S CASE PRESENTS ONLY ONE MAIN ISSUE. DISTINCT ISSUES ARISING BETWEEN THE PARTIES ARE NOT SEPARABLE CONTROVERSIES.

(1892) *Torrence* v. *Shedd,* 144 U. S. 527; 36 L. Ed. 528.

(1915) *American Surety Co.* v. *Conway,* 222 Fed. 140.

The argument has been made by those who heretofore resisted this motion that the jurisdiction of a federal

court may be sustainable under the theory of convenience, *i. e.*, that the bill really contains a permissible collection of independent suits. Our paragraph 8 in our motion before this court meets this contention. The law is:

EVEN IN CASES WHERE DIFFERENT DEFENDANTS MAY PROPERLY BE JOINED IN ONE BILL OF COMPLAINT TO QUIET TITLES TO DIFFERENT TRACTS, SUCH COLLECTION OF ENTIRELY DISTINCT AND INDEPENDENT SUITS IS NOT REMOVABLE UNDER THE STATUTE. ONLY THAT DISTINCT AND INDEPENDENT SUIT BETWEEN THE PLAINTIFF AND THE REMOVING DEFENDANTS AS TO THE ONE TRACT CAN BE REMOVED, AND THE CASE STAYS IN THE STATE COURT EXCEPT THAT PART OF IT RELATING TO THE REMOVING DEFENDANTS.

(1885) *Union P. R. Co.* v. *Myers*, 115 U. S. 1; 29 L. Ed. 319.

(1922) *Commissioners* v. *St. Louis R. Co.*, 257 U. S. 547; 66 L. Ed. 364.

(1916) *Stuart* v. *Colorado, etc. Co.*, 61 Col. 58.

(1914) *Idaho* v. *American Surety Co.*, 218 Fed. 678.

(1882) *Chicago* v. *Hutchinson*, 15 Fed. 129.

(1907) *Deepwater R. Co.* v. *Western, etc. Co.*, 152 Fed. 824.

II.

IT IS THE DUTY OF THE FEDERAL COURTS, AT WHATEVER STAGE OF LITIGATION IT DISCOVERS THAT FEDERAL JURISDICTION IS LACKING, TO REMAND THE SUIT TO A STATE COURT WHERE IT WAS COMMENCED.

(1916) *Charroin* v. *Manufacturing Co.*, 236 Fed. 1011.

(1911) *Chicago, etc. R. Co.* v. *Willard*, 220 U. S. 413; 55 L. Ed. 521.

(1890) *Graves* v. *Corbin*, 132 U. S. 571; 33 L. Ed. 462.

(1892) *Torrence* v. *Shedd*, 144 U. S. 527; 36 L. Ed. 528.

THE RIGHT TO REMOVE ON GROUNDS OF A SEPARABLE CONTROVERSY MUST CLEARLY APPEAR. IF THE FEDERAL COURT IS DOUBTFUL WHETHER THE BILL OF COMPLAINT PRESENTS A SEPARABLE, REMOVABLE CONTROVERSY, THE COURT SHOULD REMAND THE CASE.

(1910) *Wrightsville H. Co.* v. *Colwell*, 180 Fed. 589.

(1919) *Boykin* v. *Morris, etc. Co.*, 257 Fed. 827.

(1902) *Ernst* v. *American, etc., Co.*, 114 Fed. 981.

(1906) *Nash* v. *McNamara*, 145 Fed. 541.

(1909) *Thacker Coal Co.* v. *Norfolk, etc. R. Co.*, 171 Fed. 271.

CONCLUSION.

As we have said several times in the process of this litigation, the lessors and mortgagee consider that the problem presented by the Chicago Auditorium Association is one for settlement on a fair and reasonable basis across the table. All of us are averse to plaintiff's proposal for the infliction of judicial force; for we are convinced that a court cannot grant the prayers for relief without impairing the rights of the fee owners and of the bondholders, without making new contracts and without trespassing upon private rights. The question of jurisdiction must continue to be raised until it can no longer be raised.

Equity jurisdiction—the only issue presented by the appeal of Chicago Auditorium Association—is, we persist in thinking, still *doubtful*. (We say this with all respect to your honors; our petition for rehearing, pending as this memorandum is prepared, evidences our sincere belief that this court's reversal of the District Court is erroneous.) The existence of that doubt has only a slight bearing upon the pending motion. The bearing is that the weight of that doubt ought to be added to the weight of the argument here set forth as to federal jurisdiction under the Removal Act. For the Supreme Court has declared many times that where jurisdiction is merely doubtful, federal jurisdiction should not be retained.

At all times these moving parties have urged that federal jurisdiction is completely lacking; that there is no question of the plaintiff's inability to gain the relief it seeks without joint remedy against all the lessors and the mortgage trustee, and that the entire case ought to be sent back to the Circuit Court of Cook County. Un-

der authorities above cited, the point of federal jurisdiction can be raised at any stage of litigation until the absolute end. This court now has jurisdiction for the purpose. It is the first occasion upon which these moving parties have been enabled or required to stress the particular point during the appellate proceedings.

For all the reasons hereinabove advanced and upon the authorities submitted under the Removal Act, we earnestly urge our motion. The order or orders heretofore entered should be vacated and the record should be returned to the District Court with directions to remand the whole case to the state court, or, in the alternative, to remand so much of the case as does not concern exclusively the Sears-Slater defendants.

Respectfully submitted,

SAMUEL TOPLIFF,
HOMER H. COOPER,
Solicitors for Mark Skinner Willing and The Northern Trust Co. as Trustees, etc., and Mark S. Willing.

LOUIS M. GREELEY,
Guardian ad Litem for certain infant defendants.

And on the same day, to wit: On the *twenty-fifth day of June, 1927*, there was filed in the office of the clerk of this court a certain Proof of Service, which said Proof of Service is in the words and figures following, to wit:

In the United States Circuit Court of Appeals

For the Seventh Circuit.

Chicago Auditorium Association,
Appellant,
—vs—
Mark Skinner Willing, *et al.*,
Appellees.
No. 3733.

NOTICE AND RECEIPT.

To Walter L. Fisher, Esq., and William W. Cook, Esq., of Messrs. Fisher, Boyden, Kales & Bell, Counsel for Appellant:

Please Take Notice that the undersigned, as counsel for appellees, are filing in above entitled cause a petition for rehearing in accordance with Rule 26 of the above entitled court and in accordance with practice. Copies of said petition are herewith handed to you.

Samuel Insull
Horace H. Chase,
Counsel for Mark Skinner Willing and The Northern Trust Company, as Trustees, etc., and Mark S. Willing;
Pierce H. McCullough,
Counsel for Illinois Merchants Trust Company, as Trustee, etc.
Winthrop D. Pinkerton,
Wilson Wentworth,
James E. Gorin,
Counsel for William A. Glasier, et al., Trustees, etc.
Lewis M. Gunther,
Guardian ad litem of certain infants.
Howard B. Wood
(Howard G. Wilson, his counsel)
Guardian ad litem of certain infants.

Received a copy of this notice and also copies of the petition for rehearing therein mentioned, this 26th day of June, 1922.

Walter L. Fisher
Wallace W. Cox.

Endorsed: No. 3735. In the United States Circuit Court of Appeals For the Seventh Circuit. Chicago Auditorium Association, Appellant, vs. Mark Skinner Willing, et al., Appellee. Notice and Receipt. Filed Jun 26 1922 Edward U. Holloway, Clerk. Hamlin, Dayliff & Cooper, Suite 1301-1307 105 South La Salle Street. Telephone Randolph 2960.

And on the same day, to wit: On the twenty-fifth day of June, 1922, there was filed in the office of the clerk of this court a Notice and Proof of Service, which said Notice and Proof of Service is in the words and figures following, to wit:

In the United States Circuit Court of Appeals

For the Seventh Circuit.

Chicago Auditorium Association, *Appellant*, vs. Mark Skinner Willing, *et al.*, *Appellees*. } No. 3735.

NOTICE OF MOTION.

To Walter L. Fisher, Esq., and
William W. Cox, Esq., of
Messrs. Fisher, Boyden, Bates & Bell,
Counsel for Appellant;
Frank H. McCulloch,
Counsel for Illinois Merchants Trust Company, et al., Trustees, etc.
Winfield D. Follansbee,
Watson Washburn,
John E. Gavin,
Counsel for William A. Slater, *et al.*, Trustees, etc.
Russell D. Mann (Messrs. G. Willis, his counsel) Guardian *ad litem* of certain infants:

Please Take Notice that the undersigned, as counsel for

certain appellees, are filing in above entitled cause their motion to vacate all orders herein heretofore entered and to remand this cause to the Circuit Court of Cook County, State of Illinois. Said motion and a memorandum of points and authorities in support thereof are filed in connection with a petition for rehearing likewise filed by said moving parties as appellees. Copies of said motion and of said memorandum are herewith handed to you.

Samuel Tuttle,
Homer H. Cooper,
Counsel for Mark S. Willing and The Northern Trust Company, as Trustees, etc., and Mark S. Willing;
Louis W. Gramley,
Guardian ad litem of certain infants.

Received a copy of this notice and also notice of the motion and memorandum therein mentioned this 24th day of June, 1927.

Walker L. Fisher,
Warren W. Cook,
Frank H. McClennen,
Henry G. Miller,
Edwards & Moore,
Benjamin B. Poindexter,
Watson Washburn,
James E. Gorey,

Endorsed: No. 3733. In the United States Circuit Court of Appeals for the Seventh Circuit. Chicago Auditorium Association, Appellant, v. Mark Skinner Willing, et al., Appellees. Notice of Motion. Filed June 25, 1927. Edward U. Holloway, Clerk. Louis W. Gramley, 105 S. La Salle Street, Chicago, Illinois, and Hamlin, Tuplitt & Cooper, Suite 1301-1302, 105 South La Salle Street, Telephone Randolph 1841.

And afterwards, to wit: On the first day of July, 1927, there was filed in the office of the clerk of this court a certain Answer to Petition for a Rehearing, which said Answer to Petition for a Rehearing is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733

Chicago Auditorium Association, *Appellant,*
vs.
Mary Skinner Willing, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ANSWER OF APPELLANT TO PETITION FOR REHEARING.

WALTER L. FISHER,
WILLIAM W. CASE,
Counsel for Appellant.

Endorsed: Filed Jul 1 1927 Edward M. Holloway, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 3733

Chicago Auditorium Association, *Appellant*,
vs.
Mark Skinner Willing, *et al.*, *Appellees.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ANSWER OF APPELLANT TO PETITION FOR REHEARING.

I.

The Decision of the Court.

Appellees contend first that the decision of this court on the jurisdictional question is erroneous. We can see no useful purpose in reiterating arguments which have already received such ample consideration. Two or three last-minute decisions are cited by appellees under this head.

The *Subirana* case is one in which a claimant of land in Porto Rico, being out of possession and having an adequate remedy at law, was denied relief in equity, the court saying:

> "The bill undoubtedly alleges a cause of action at law for trespass, but no ground for the interposition of a court of equity."

In the *Liberty Warehouse Company* case, the court declined to extend its equitable jurisdiction in pursuance of a statute of the Kentucky Legislature authorizing the entry of declaratory judgments irrespective of the existence or non-existence of a real justiciable controversy. The distinction so often insisted upon by the Supreme Court, and carefully indented in appellant's briefs, between moot questions of a still speculative character and present justiciable controversies, is consistently observed, and the court says:

> "The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under

the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. This is its entire scope."

II.

Criticism of the Opinion in Matter of Form.

The next objection of appellees is to the form of the court's opinion. This is a matter in which we do not presume to meddle, except to say that the actual scope of the decision is clearly indicated by the language of the opinion itself, and that we do not see how the court could well have said less. If equitable jurisdiction were to be determined by invoking one or two mechanical rules, there might be some point in this criticism. The idea that the court should function *in vacuo* is naturally acceptable to counsel who scent a danger in any consideration of the actual case before the court, and of the facts and necessary conclusions which justify the court in assuming and retaining jurisdiction.

Here, again, counsel reveal their singular obsession, sufficiently noticed in our briefs, about the significance of the case of *Bass* v. *Metropolitan West Side Elevated Railroad Company*. The only additional authority now cited is an opinion handed down June 14, 1927, by the Illinois Appellate Court in *The Northern Trust Company* v. *Thompson*, in which the court used language about the rights of a lessee under a long term lease inconsistent with certain views expressed by this court in the present case. The Northern Trust Company owned the fee to the demised property as trustee, and negotiated with the lessee a written agreement about rebuilding, which was not to be operative, however, until approved by a court of equity. Judge Ryner, in the Cook County Circuit Court, entered a decree approving the agreement, but judgment was reversed by the Appellate Court on the grounds that the lease did not by its own force give the lessee the right to rebuild; that the trust instrument did not empower the trust company to enter into the proposed agreement; and that no necessity was shown sufficiently acute to justify a court in overriding the terms of the trust. It is the language of the court regarding the first of these points upon which appellees now rely. The case might, no doubt, be distinguished in various ways from the one now under consideration, but we think we need only say about it

now (1) that the examination and discussion of the question by the Illinois Appellate Court was very superficial in comparison with the attention bestowed upon it by this court, other features of the case engaging a great part of the state court's attention; (2) that counsel and the court did not enjoy the advantage of a perusal of this court's opinion in the present case; and (3) that this disadvantage has now been remedied, and a petition for rehearing has been filed and is now pending in the Appellate Court of Illinois, in which adequate extracts from this court's opinion are incorporated.

III.

Trustees and Bondholders.

Mindful, perhaps, of the rebuke administered at the oral argument and implied in the written opinion, counsel who assumes to represent the Illinois Merchants Trust Company, trustee under the trust deeds, but who expressly disclaims any representation of the bondholders, returns to the encounter and still insists upon his inviolable legal right to sacrifice for a supposed legal technicality the interests of the investors who are his real but not his nominal clients. In the original bill of complaint (Rec., 30) the Illinois Merchants Trust Company, by its then name Illinois Trust and Savings Bank, was made a defendant both as trustee and as representative of the bondholders, but counsel for the bank disclaimed any authority to represent the bondholders (Rec., 105) and insisted that they themselves were necessary parties. This attitude of the bank led plaintiff to select members of each of the three groups of bondholders as representatives of the class to which they belonged, and to make them defendants in that capacity, and each of these representative groups of bondholders filed an answer (Rec., 151, 153, 155) consenting to the relief sought by the bill of complaint. This was done after written notice had been mailed by the bank to all known bondholders (Rec., 205, 206) advising them that certain individual bondholders had been made parties as representatives of the entire class, but that any bondholder was at liberty to appear by independent counsel. It is in the face of these meticulous precautions, which were taken in the name of the bank but in fact by appellant

(Rec., 207), that counsel assuming to represent the bank takes the position disclosed by the present record.

The interests of the bondholders are in all material respects identical with those of the plaintiff. After protesting that as attorney for the bank he does not and cannot represent the bondholders, after forcing plaintiff to bring the bondholders before the court by appropriate amendments, and after the bondholders themselves have in effect united with plaintiff in the prayer of its bill, counsel still seeks in the name of the bank, whose only legitimate concern is the protection of the bondholders, to interpose every obstacle within his power to the granting of the relief they seek.

We give this branch of the case more attention than it seems to us to deserve upon the merits, and we do so because the position taken by counsel for the bank on the oral argument, and now renewed in this petition for rehearing, is as mysterious and incomprehensible to us as it appears to be to the members of this court.

IV.

Rumors.

Were we to follow the example set by appellees on page 14 of their petition for a rehearing by referring to matters such as newspaper reports outside of the record, we might mention the disastrous effects of the announced proposal of the Chicago Opera House Company to abandon the Chicago Auditorium theatre and provide itself with a home of its own, thus depriving appellant of one of its chief sources of revenue; and we might comment upon the enormous increase in appellants expenses due to the renewal of its contract for light, heat and power at vastly augmented cost; to the great increase in its ground rent occasioned by the decennial reappraisal of the Studebaker property; to the steady advance of general taxes; and to the unfavorable financial results of operation since the evidence was closed in the court below. Even if these matters were in the record, however, they would not alter the essential features of the case, and are no more proper for the consideration of the court than the other matters of alleged notoriety instanced in the petition for rehearing.

V.

Federal Jurisdiction.

Along with the petition for rehearing there has been served upon us a motion on behalf of part of the petitioners asking this court to vacate all orders, and especially the order of affirmance (*sic*), and remand the cause to the Circuit Court of Cook County. Interpreting this as a motion to send the case back to the District Court with directions to remand it to the state court, we are in some doubt with respect to the wishes of this court in dealing with the motion.

We have been at all times and now are ready to meet the appellees, or any of them, on the issue of federal jurisdiction. This is a question which can, of course, be raised at any time by any court in which the case is pending, upon its own motion or otherwise. This case appears to be pending here only upon motion for rehearing, and we should suppose that unless that motion was first granted, and the order of reversal and remandment vacated, this court would not wish to burden itself with a jurisdictional question which parties might have brought to the attention of this court at an earlier stage. We are ready whenever called upon to file a formal brief with full citation and discussion of the authorities, but until the pleasure of the court is otherwise indicated, we content ourselves with a brief memorandum of points and supporting decisions.

The active defendants in this cause occupy two camps, having identical interests but adopting different tactics. There are the Sears interests, owning part of the fee, and the Willing interests, owning another part. The Sears defendants reside in the east, and the Willing defendants in Illinois. The original bill was filed in the Circuit Court of Cook County against both groups to remove clouds upon their separate leasehold estates arising out of identical states of fact. The removal of such cloud from the leasehold estate in the Sears property would in no manner affect the owners of the Willing interest. The issues between the plaintiff and the two groups of defendants were and are entirely distinct, but by reason of the identity of the questions involved the causes of action were properly combined in a single proceeding. This is the situation commonly presented whenever any question arises about the removability of a separate controversy. In accordance with established rules of pleading, the

plaintiff united in one suit controveries or causes of action which might have been prosecuted separately, as is always permissible when there is a determining point common to the entire litigation. Such was the condition of this cause when pending in the state court. On the principle no doubt of a fair division of labor, the Sears defendants removed the cause to the federal court on the allegation of a separable controversy between them and the plaintiff, and after Judge Wilkerson had denied a motion to dismiss the bill for want of equitable jurisdiction the Willing interests moved to remand the cause to the state court, claiming that the alleged separable controversy did not exist.

This motion was argued at length before Judge Wilkerson, at whose request a brief memorandum of points, with supporting citations of authority but without extended written argument, was filed in his court. We provisionally adopt the same course now, while awaiting any further requirements of this court.

1. If in any suit otherwise removable there is a controversy between citizens of different states which can be fully determined between them, any defendant actually interested in such controversy may remove the suit to the federal court.

Judicial Code, Section 28.

2. A plaintiff, having two causes of action which present a common and decisive point of litigation, may at his election prosecute them separately or combine them in a single suit. If he adopts the latter alternative and some of the defendants remove their separable controversy to the federal court, the whole cause is removed, and the other defendants cannot refuse to go into the federal court because they are all citizens of the same state with the plaintiff and might have been sued separately.

Barney v. *Latham*, 103 U. S. 336.
Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Bitterman v. *Louisville & Nashville R. R. Co.*, 207 U. S. 205.
Curran v. *Campion*, 85 Fed. 67.
Wyman v. *Bowman*, 127 Fed. 257.
Boatman's Bank v. *Fritzlen*, 135 Fed. 650 (certiorari denied, 198 U. S. 586).
Elder v. *Western Mining Co.* 237 Fed. 966, 977.
Commodore's Point Terminal Co. v. *Hudnall*, 283 Fed. 150, 176.
Lake Charles Mill Company v. *Pacific Rice Grower's Association*, 295 Fed. 246, 250.

3. A bill to quiet title, or for similar relief, which contains no allegation that the defendants claim jointly or from a common source, or that any privity of interest exists between them, presents a separable controversy, the defendants being joined for convenience.

Connell v. *Smiley*, 156 U. S. 335.
Des Moines Navigation Co. v. *Iowa Homestead Co.*, 123 U. S. 552.
Goodenough v. *Warren*, 10 Fed. Cas. 5534.
Field v. *Lownsdale*, 9 Fed. Cas. 4769.
Goldsmith v. *Gilliland*, 24 Fed. 154.
Stanbrough v. *Cook*, 38 Fed. 369.
Bacon v. *Felt*, 38 Fed. 870.
Bates v. *Carpentier*, 98 Fed. 452.
Carothers v. *McKinley Mining Co.*, 116 Fed. 947.
McMullen v. *Halleck Cattle Co.*, 193 Fed. 282.

4. Where, moreover, the material facts pleaded disclose the presence of a separable controversy, the right of removal exists.

Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Boyd v. *Gill*, 19 Fed. 145.
Winfield v. *Wichita Gas Co.*, 267 Fed. 47.

5. While a controversy, to be removable, must be one which can be wholly determined between citizens of different states, it is only the necessary and indispensable parties who are to be considered. Those may be disregarded who are properly joined in the suit but are not indispensable to its determination.

Geer v. *Mathiesen Alkali Works*, 190 U. S. 428.
Barney v. *Latham*, 103 U. S. 205.
Connell v. *Smiley*, 156 U. S. 335, 340.
Salem Trust Co. v. *Manufacturers Finance Co.*, 264 U. S. 182.
Boatmen's Bank v. *Fritzlen*, 135 Fed. 650 (certiorari denied 198 U. S. 586).
Venner v. *Southern Pacific Co.*, 279 Fed. 282 (certiorari denied 258 U. S. 628).
Old Dominion Oil Co. v. *Superior Oil Corporation*, 283 Fed. 636.

6. It is the duty of the court to make the proper alignment of parties in accordance with the essential character of the case, without regard to their position as plaintiff or defendant in the pleadings.

Removal Cases, 100 U. S. 457.

Niles-Bement Co. v. *Iron Moulders Union,* 254 U. S. 77.

Boatmen's Bank v. *Fritzlen,* 135 Fed. 650 (certiorari denied 198 U. S. 586).

7. Except in eminent domain or special assessment proceedings or other instances where distinct causes of action may be joined in one proceeding by authority of some special statute, the removal of a separable controversy carries the entire cause to the federal court.

Barney v. *Latham,* 103 U. S. 205.

Brooks v. *Clark,* 119 U. S. 502.

Connell v. *Smiley,* 156 U. S. 335.

Road Dist. v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547.

Pacific Railroad Removal Cases, 115 U. S. 1.

Deepwater Railway Co. v. *Western Pocahontas Co.,* 152 Fed. 824.

Young v. *Southern Pacific Co.,* 15 Fed. (2d) 280.

All of which is respectfully submitted.

WALTER L. FISHER,
WILLIAM W. CASE,
Counsel for Appellant.

And on the same day, to wit: On the first day of July, 1927, there was filed in the office of the clerk of this court a Proof of Service, which said Proof of Service is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Chicago Auditorium Association, *Appellant,* *vs.* Mark Skinner Willing, *et al.,* *Appellees.*	No. 3733.

PROOF OF SERVICE OF ANSWER OF APPELLANT TO PETITION FOR REHEARING.

Please Take Notice that today, July 1, 1927, we are filing with the Clerk of the United States Circuit Court of Appeals

for the Seventh Circuit the answer of Appellant to petition for rehearing in the above entitled cause.

WALTER L. FISHER,
WILLIAM W. CASE,
Counsel for Appellant.

Received a copy of the foregoing notice and a copy of Answer of Appellant to Petition for Rehearing this 1st day of July, 1927.

SAMUEL TOPLIFF,
HOMER H. COOPER,
Counsel for Mark S. Willing and The Northern Trust Company as Trustees under the Last Will and Testament of Henry J. Willing, deceased, and Mark S. Willing.

MITCHELL D. FOLLANSBEE,
ROBERT W. SCHUPP,
JOHN E. GAVIN,
WATSON WASHBURNE,
Counsel for William A. Slater, Charles L. Harrison and E. Halsey Malone, Trustees under the Last Will and Testament of William A. Slater, deceased; Bayard Warren, Jr., and Bayard Tuckerman, Jr., as Trustees; and William A. Slater, Ellen B. Slater, Eleanor Malone, Elizabeth Sears Warren and Phyllis Sears Tuckerman.

FRANK H. MCCULLOCH,
Counsel for Illinois Merchants Trust Company as Trustee under a Trust Deed from The Corporation of The Fine Arts Building, dated March 5, 1903, etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated Feb. 1, 1889, etc.; Illinois Merchants Trust Company, as Trustee under a Trust Deed from Chicago Auditorium Association, dated Feb. 1, 1892, etc.

LOUIS M. GREELEY,
Guardian ad litem of Infant Defendants Margaret Willing, Evelyn Fitzsimmons Willing and Mark Skinner Willing, Jr.
ROSWELL B. MASON,
Guardian ad litem of Infant Defendants John Fox Slater, Elena De Steuer, Adrian Malone, Bayard Warren, Jr., Lily Warren, Caroline Sears Warren, Phyllis Tuckerman, Richard Mortimer Tuckerman and Herbert Tuckerman.
HENRY G. MILLER,
Of Counsel for Roswell B. Mason as Guardian ad litem.

Endorsed: General No. 3733. In the United States Circuit Court of Appeals, for the Seventh Circuit. Chicago Auditorium Association, Appellant, vs. Mark Skinner Willing, et al., Appellees. Proof of Service of Answer of Appellant to Petition for Rehearing. Filed July 1, 1927. Edward M. Holloway, Clerk. Fisher, Boyden, Kales & Bell, 134 S. La Salle Street, Chicago. Telephone Franklin 2225.

And afterwards, to wit: On the thirtieth day of August, 1927, the following further proceedings were had and entered of record, to wit:

Tuesday, August 30, 1927.

Court met pursuant to adjournment.

Present:
Hon. Samuel Alschuler, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Before:
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.

Chicago Auditorium Association
3733 vs.
Mark Skinner Willing, *et al.*
} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the motion of certain parties to vacate all orders herein heretofore entered and to remand

this cause to the Circuit Court of Cook County, State of Illinois, &c, and the same is hereby denied.

Chicago Auditorium Association
ETC.
vs.
Mark Skinner Willing, *et al.*

It is ordered by the court that the petition for a rehearing in this cause be, and the same is hereby overruled.

And afterwards, to wit: On the first day of September, 1897, the following further proceedings were had and entered of record, to wit:

Thursday, September 2, 1897.

Court met pursuant to adjournment.

Present:

Hon. Samuel Shellabarger, Circuit Judge.
Edward H. Holloway, Clerk.
Palmer E. Anderson, Marshal.

Chicago Auditorium Association
ETC.
vs.
Mark Skinner Willing, *et al.*

On motion of counsel for appellee, counsel for appellant present and objecting thereto, it is now here ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

United States Circuit Court of Appeals

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 585 to 665, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of

Chicago Auditorium Association,

Appellant,

vs.

Mark Skinner Willing, *et al.*

Appellees.

No. 3733, October Term, 1926, as the same remains upon the file and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Third day of September, A. D. 1927.

(Seal)

Edward M. Holloway,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 21, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.